

From: [Paul Witthoef](#)
To: [Hughes, Angela](#); [Penisten, Martha](#)
Cc: [Kathy Gibson](#); [Carlene Chambers](#)
Bcc: [Ursula Lennox](#)
Subject: Reply: Fwd: Fax from Auditors office (LICRAT audit costs)
Date: 01/12/2012 01:48 PM
Attachments: [OK Auditor 8-25-11.pdf](#)

Angela, Martha -

After review and consultation, I think the answer must be "**NO**" to both questions posed in our discussion last month, and that **neither** the State Auditor Fee **nor** proposed attorney fees for Outside Counsel would be Allowable Costs under the EPA special purpose cooperative agreement [grant] for the LICRAT trust in support of relocations and demolitions at the Tar Creek area.

40 C.F.R. sec. 31.22 directs us to **OMB Circular A-87** in our review of allowable costs for governmental assistance recipients. When none of the specific items of allowable versus unallowable costs are exactly on point, we do find ourselves applying the general principles, and also analogizing from whatever seems closest to our situation.

Here, it appears clear that the proposed items of cost (State Auditor Fee and proposed Outside Counsel for concerned trustees) are simply **not** "necessary . . . reasonable . . . eligible" costs to be allowable for this very specialized federal assistance [grant], but are closer to governmental costs of doing business as LICRAT and ODEQ, and will not advance the relocation project.

* OMB Circ. A-87 at Atch A.. c. 1. indicates costs must be 'necessary' for the grant project, and must be 'reasonable' for intended purposes. Here instead, an audit of the integrity of contract processing versus limitations of State Of Oklahoma public contracting law is clearly **not in the workplan** for this federal assistance, which is funded by a special appropriation for specific purposes of relocations and demolition (and such costs also not 'eligible' under this focused statutory authority). The proposed State Auditor spot audit visit (not a general audit, and will not provide audit opinion) seeks open-ended funding of \$150,000 and more, without specific contributions to the relocation project, and also does not seem 'reasonable' for very limited function proposed, compared to audits your agency and ours have funded for post-grant audit verification. Here instead, **spot audit** is proposed for internal **State of Oklahoma** purposes, and reflects the **State of Oklahoma's** method of funding the State Auditor by levies upon those who receive audit services, and we cannot agree that these are 'necessary' for the funded project.

* OMB Circ. A-87 specific provisions examined do not provide much support. Para. B. 40. does provide that state taxes paid by other governmental units would fairly be allowable costs under federal grants - - - but the proposed Auditor Fee is only charged to those certain agencies chosen for visits and audit review, and not generally applicable to all. Routine audit verification under the Single Audit Act may routinely have been within the pool for Indirect Cost Rate(s) for state agencies, possibly ODEQ as well, but does **not** appear to be a direct cost, and **not** a cost specifically budgeted **nor** 'approved' in this award. Also see Atch. B. 4., Audits, noting that these proposed audit costs are clearly **not** intended for a comprehensive periodic audit under OMB Circular A-133.

* OMB Circ. A-87 does, as we had discussed, have a provision at B. 10. for funding certain "legal expenses" but only when "**required** in the administration of Federal programs" and we think this would only be for program-specific litigation [e.g. condemnation] which was approved in advance in the grant,. Here instead, the proposed Outside Counsel costs would be contingent and advisory, to help advise those quasi-governmental officials at LICRAT in dealing with the Attorney General [and Auditor] of Oklahoma investigation(s), and especially due to their concern that the Attorney General of Oklahoma [who asked State Auditor to perform an audit] may have a 'conflict of interest' in his duty to defend them. If he agrees, doesn't the Attorney General of Oklahoma have a duty to provide advisory and other assistance, including Outside Counsel, to LICRAT officials ? We are just not seeing how this proposed cost is part of the federally-assisted project and its agreed workplan.

* See also OMB Circ. A-87 at B. 19. which indicates that general governmental expenses are **not** allowable "**unless provided for as a direct cost under a program statute or regulation.**"

* We share your awareness that there are still some federal funds available in the grant - - - which may be needed for other allowable adjustments as the multi-year grant project is closed out - - - but that 'availability' is NOT a factor in determining the 'allowability' of proposed costs.

I did as we discussed consult my grants law colleagues in the Office of General Counsel, Hq-EPA, who agreed generally that these proposed costs do **not** appear to be 'necessary' for this grant project, and are not allowable.

If I may be of further assistance, call me, or project officer Kathy Gibson at (214) 665-7196.

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Assistance & Information Law
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Attachment A : GENERAL PRINCIPLES FOR DETERMINING ALLOWABLE COSTS

C. Basic Guidelines

1. **Factors affecting allowability of costs.** To be allowable under Federal awards, costs must meet the following general criteria:

- a. **Be necessary and reasonable** for proper and efficient performance and

administration of Federal awards.

- b. **Be allocable** to Federal awards under the provisions of this Circular.
- c. Be authorized or not prohibited under State or local laws or regulations.
- d. **Conform to any limitations or exclusions set forth in** these principles, **Federal laws, terms and conditions of the Federal award, or other governing regulations** as to types or amounts of cost items.
- e. **Be consistent** with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.
- f. Be accorded consistent treatment. **A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.**
- g. / h. / i. / j.

2. **Reasonable costs.** A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally funded. . .

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E. Direct Costs

1. General. Direct costs are those that can be **identified specifically with a particular final cost objective.**

2. Application. Typical direct costs chargeable to Federal awards are:

- a. Compensation of employees for the time devoted and identified specifically to the performance of those awards.
- b. Cost of materials acquired, consumed, or expended specifically for the purpose of those awards.
- c. Equipment and other approved capital expenditures.
- d. Travel expenses incurred specifically to carry out the award.

3. Minor items. Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality

where such accounting treatment for that item of cost is consistently applied to all cost objectives.

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Attachment B : SELECTED ITEMS OF COST

4. *Audit costs and related services.*

- a. The costs of **audits required by, and performed in accordance with, the Single Audit Act, as implemented by Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations" are allowable.** Also see 31 USC 7505(b) and section 230 ("Audit Costs") of Circular A-133.
- b. Other audit costs are allowable **if** included in a cost allocation plan or **indirect cost** proposal, or if **specifically approved** by the awarding agency as a direct cost to an award.
- c.

10. *Defense and prosecution of criminal and civil proceedings, and claims.*

- a. The following costs are unallowable for [defense] contracts covered by 10 U.S.C. 2324(k),
- b. Legal expenses **required** in the administration of Federal programs are allowable.

Legal expenses for prosecution of claims against the Federal Government are unallowable.

19. *General government expenses.*

- a. The general costs of government are **unallowable** (except as provided in Attachment B, section 43, Travel costs). These include:
 - (1) Salaries and **expenses** of the Office of the Governor... or the chief executive of a political subdivision . . . ;
 - (2) Salaries and **other expenses** of a State legislature, tribal council, or similar local governmental body, . . .
 - whether incurred for purposes of legislation or executive direction;
 - (3) Costs of the judiciary branch of a government;
 - (4) **Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by program statute or regulation** (however, this does not preclude the allowability of other legal activities of the Attorney General); and
 - (5) Costs of other general types of government services normally provided to the general public, such as fire and police,
 - unless provided for as a direct cost under a program statute or regulation.**
- b. For federally recognized Indian tribal governments and Councils Of Governments (COGs),

20. *Goods or services for personal use.* Costs of goods or **services for personal use** of the governmental unit's employees are **unallowable** regardless of whether the cost is reported as taxable income to the employees.

32. *Professional service costs.*

- a. Costs of professional and consultant services are allowable, subject to subparagraphs b and c when reasonable
 - in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government.In addition, legal and related services are limited under Attachment B, section 10.
- b. In determining the allowability of costs in a particular case, no single factor or any special
 - combination of factors is necessarily determinative. However, the following factors are relevant:
 - (1) The nature and scope of the service rendered in relation to the service required.
 - (2) The **necessity** of contracting for the service, considering the governmental unit's capability in the particular area.
 - (3) The **past pattern** of such costs, particularly in the years prior to Federal awards.
 - (4) The impact of Federal awards on the governmental unit's business (i.e., what new problems have arisen).

(5) Whether the proportion of Federal work to the governmental unit's total business is such as to influence

the governmental unit in favor of incurring the cost, particularly where the services rendered are **not of a continuing nature**

and have **little relationship to work under Federal grants** and contracts.

(6) Whether the service can be performed more economically by direct employment rather than contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-Federal awards.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions).

C.

40. *Taxes.*

a. Taxes that a governmental unit is legally required to pay are allowable, except for **self assessed taxes** that disproportionately affect Federal programs or changes in tax policies that disproportionately affect Federal programs. This provision becomes effective for taxes paid during the governmental unit's first fiscal year that begins on or after January 1, 1998, and applies thereafter.

b. Gasoline taxes, motor vehicle fees, and **other taxes that are in effect user fees for benefits provided to the Federal Government** are allowable.

c. This provision does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate. Where the identification of the amount of unallowable taxes would require an inordinate amount of effort, the cognizant agency may accept a reasonable approximation thereof.

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▼ "Hughes, Angela" ---12/12/2011 03:45:53 PM---Thank you for taking our call today. Here is the letter contract that was sent to the LICRA Trust.

From: "Hughes, Angela" <Angela.Hughes@deq.ok.gov>
To: Paul Witthoeft/R6/USEPA/US@EPA
Date: 12/12/2011 03:45 PM
Subject: FW: Fax from Auditors office

Thank you for taking our call today. Here is the letter contract that was sent to the LICRA Trust.

Angela Hughes
Environmental Programs Manager
Land Protection Division
Oklahoma Department of Environmental Quality
wk 405-702-5141
cell 405-535-6054
Angela.Hughes@deq.ok.gov

From: Penisten, Martha

Sent: Monday, December 12, 2011 3:38 PM
To: Hughes, Angela
Subject: FW: Fax from Auditors office

fyi

Martha Penisten, General Counsel
Office of the General Counsel
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707 N. Robinson, P.O. Box 1677
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405.702.7184 (telephone)
405.702.7101 (fax)
Martha.Penisten@deq.ok.gov

From: Powell, Tyler [mailto:rtpowell@environment.ok.gov]
Sent: Friday, August 26, 2011 10:52 AM
To: 'Osborn, Mark'
Cc: Penisten, Martha
Subject: Fax from Auditors office

Dr. Osborn, this came to our office today. With the trust office shutting down, I advised the State Auditor's office to use our office for official correspondence. I am sure this will be the first of many emails.

Tyler Powell

Director
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3800 N. Classen Boulevard
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